(2)

FILED
OCT 15 1993
OFFICE OF THE CLERK

No. 93-481

In The

Supreme Court of the United States

October Term, 1993

HOWARD WYATT,

Petitioner,

vs.

BILL COLE and JOHN ROBBINS, II,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT ROBBINS IN OPPOSITION

JOSEPH LERAY MCNAMARA
MCNAMARA, KELLY & WELSH

Counsel of Record
4273 I-55 North, Suite 200
Jackson, Mississippi 39206
(601) 362-6700

T. JACKSON LYONS*
JANE SANDERS LEWIS*

LEWIS & LYONS, ATTORNEYS,
4273 I-55 North, Suite 200
Jackson, Mississippi 39206

Attorneys for Respondent

*Of Counsel

October 15, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

6 pp

No. 93-481

In The

Supreme Court of the United States

October Term, 1993

HOWARD WYATT,

Petitioner,

vs.

BILL COLE and JOHN ROBBINS, II,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT ROBBINS IN OPPOSITION

STATEMENT OF THE CASE

Respondent Robbins would respectfully direct this Court's attention to its previous opinion in this case, *Wyatt v. Cole*, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992), for the relevant facts. On remand, the Court of Appeals for the Fifth Circuit reported the facts relevant to the successful good faith defense in affirming the district court's decision, *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir. 1993). The Court of Appeals decision is also attached as the Appendix to the Petition.

ARGUMENT IN OPPOSITION TO GRANT OF WRIT

In this Court's previous opinion, all Justices recognized that an affirmative defense of good faith reliance upon a presumptively valid statute could be raised in the context of a Section 1983 action against private persons under *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The Court said, "[W]e do not foreclose the possibility that private defendants faced with Section 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that Section 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Wyatt v. Cole*, 112 S.Ct. at 1834.

Mr. Wyatt, in his Petition, simply misstates the basis of the Court of Appeals' decision. The Court of Appeals' holding, as quoted in the Petition at 4, shows that the court properly discarded its earlier qualified immunity rationale under *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982). The holding shows the Court of Appeals concluded, under its analysis of the outlines of the good faith defense, that Respondents bear no Section 1983 liability to Wyatt under the facts of this case.

In his Petition, Wyatt appeals to this Court's sense of fair play by asserting that the "immunity" provided to Cole and Robbins leaves the innocent victim without a remedy as against wrongdoers, even those acting in ignorance. Petition at 5. However, Wyatt was free to choose any avenue of vindication. That he chose to claim a right encumbered necessarily with *Lugar*'s complex rules and defenses to his own detriment is no argument to visit such detriment upon Respondents.

In any event, the Court of Appeals examined the bases of a good faith defense and correctly found that Wyatt had failed to meet his burden of proof. Section 1983 expressly provides no immunities or defenses, *Imbler v. Pachtman*, 424 U.S. 409 (1976). However, Section 1983 has always been read " 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Malley v. Briggs*, 475 U.S. 335 (1986), *quoting Imbler*, 424 U.S. 418.

The Court of Appeals then reviewed the three opinions of this Court for common elements of the good faith defense. The majority opinion noted forthrightly that at common law private defendants could avoid liability for malicious prosecution or abuse of process if they acted without malice and with probable cause. *Wyatt*, 112 S.Ct. at 1833, fn. 2. Concurring, Justice Kennedy said "[i]n both of the common law actions, *it was essential for the plaintiff to prove* that the wrongdoer acted with malice and without probable cause." *Id.* at 1835 (emphasis supplied). Dissenting, the Chief Justice said that describing the unwitting reliance upon an invalid statute as a good faith "defense" was something of a misnomer: at "common law it was the *plaintiff's burden* to establish as elements of the tort both that the defendant acted with malice and without probable cause." *Id.* at 1838, fn. 1 (emphasis supplied).

Based on these common elements, and its analysis of the common law torts of malicious prosecution and abuse of process, the Court of Appeals concluded that where plaintiffs seek to hold private defendants liable under *Lugar*, they must show that the defendants acted with

malice and that the defendants acted without probable cause. *Wyatt*, 994 F.2d at 1120.

There is no evidence in this case that Cole or Robbins acted with malice or without probable cause. Wyatt suggests that based on the Court of Appeals' decision in *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978), Cole, or at least the attorney Robbins, knew or should have known that the Mississippi statute was unconstitutional. *Johnson* notwithstanding, the Supreme Court of Mississippi opined in 1979 that the Mississippi replevin statute, amended subsequent to *Fuentes v. Shevin*, 407 U.S. 67 (1972), was constitutional. *Finance America Private Brands, Inc. v. Durbin*, 370 So.2d 1365 (Miss. 1979).

As the Court of Appeals observed, Robbins' and Cole's "invocation of the Mississippi statute was not objectively unreasonable." *Wyatt*, 994 F.2d at 1121. The court then turned its attention to examining whether they had subjective knowledge of the constitutional infirmity. Wyatt argued that Cole acted with malice in at least three ways: he threatened Wyatt with unspecified "policitcal influence"; he had no grounds for bringing the replevin action; and he subsequently disobeyed a court order to restore the livestock.

However, these claims of "malice in the air" do not speak to the specific question a plaintiff in a 1983 action against private defendants must answer: whether the defendants knew or should have known of the statute's unconstitutionality; that is, whether they acted with malice and without probable cause. *Wyatt*, 994 F.2d at 1121. Even if Robbins' and Cole's actions amount to a misuse of state procedures, facts indicating such misuse do not

address the state of their knowledge about the *statute's* invalidity. Under Section 1983, Wyatt seeks to hold Cole and Robbins liable for depriving him of his cattle without due process under federal law, not for abuse of state process.

On summary judgment Wyatt bore the burden of coming forth with evidence upon issues he would have had to prove at trial, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). His failure to produce any evidence relating to the defendants' actual knowledge of the statute's infirmity, or evidence showing that they should have known of its invalidity, means that the Court of Appeals' judgment upon remand was correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH LERAY MCNAMARA
MCNAMARA, KELLY & WELSH

Counsel of Record
4273 I-55 North, Suite 200
Jackson, Mississippi 39206

T. JACKSON LYONS*
JANE SANDERS LEWIS*

LEWIS & LYONS, Attorneys
4273 I-55 North, Suite 200
Jackson Mississippi 39206

Attorneys for Respondent

*Of Counsel

October 15, 1993